BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2014-346-WS

IN RE:)) Application of Daufuskie Island Utility) Company, Inc. for Approval of an) Increase for Water and Sewer Rates,) Terms and Conditions.))	**DIUC REPLY BRIEF IN SUPPORT OF REQUEST FOR REPARATIONS**

Pursuant to Commission Order 2021-132 Approving Settlement and Further Procedure entered on March 30, 2021 ("Order Approving Settlement" or "Order 2021-132"), Daufuskie Island Utility Company, Inc. ("DIUC") filed its Submission in Support of Request for Reparations ("DIUC Submission") and served the same on May 17, 2021. The Submission explained that:

1. Over the past six years of this proceeding, DIUC has been placed in an inferior position because of the extensive delays in obtaining a final, proper rate ruling. DIUC was prevented from earning the rate of return the Commission and all the parties now agree is the sufficient and proper.

2. The 108.9% increase of Order 2021-132 (effective March 1, 2021) should have been in effect from October 1, 2017 until March 1, 2021, to allow DIUC to meet the 108.9% requirement that is consistent with its original application and with the current rates agreed to and approved by the Commission in Order 2021-132.

3. The inadequate rates in effect from October 1, 2017 until March 1, 2021, (which were billed to customers in their January 1, 2018 billing for the last quarter of 2017 until the March 1, 2021 effective date of the 108.9% increase), were confiscatory and constitutionally insufficient, resulting in a revenue shortfall in the combined amount for DIUC's water and wastewater billings of $668,641 for that period.

4. When the Commission's January 1, 2018, Order on Rehearing only allowed an 88.5% increase, which became effective for past period of service from April 1, 2016 to January 1, 2018 (the duration the 108.9% increase was in effect under bond), DIUC issued a refund to customers of the difference between the 108.9% it collected and the 88.5% authorized as of January 1, 2018. The refunded amount totaled $232,542.

5. Allowing the ratepayers to keep the refunds for service provided from April 1, 2016 to September 30, 2017, and to retain the benefits of services from October 1, 2017 to March 1, 2021, at a windfall rate to the detriment of DIUC is not constitutional.

6. Reparations / Refunds are justified and necessary and this Commission is empowered to direct the same be implemented.

7. Assuming a worst case scenario that Commission proceeding(s) and appeal(s) mean DIUC cannot collect reparations to address these confiscatory rates until January 1, 2023:
    a. Applying the weighted average carrying cost rate for billings of 44.4647% to the $668,641 revenue shortfall produces carrying costs of $297,309 or a total reparation amount of $965,951.

    b. Applying the weighted average carrying cost of 56.063% to refund/credit of $232,542 owed to DIUC to address the January 2018 refund produces carrying costs of $130,370 for a total refund/credit of $362,912.

6. DIUC has kept records of payments by each customer so that precise amounts due for each account can be calculated then billed to the actual customer for the precise amount due in order to address the customers prior windfall.

On June 17, 2021, the South Carolina Office of Regulatory Staff ("ORS") and the Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, (collectively "POAs") each filed a Brief in Opposition to DIUC's Request for Reparations. In accordance with the procedure outlined in Order 2021-132, DIUC herewith files this Reply Brief in Support of Request for Reparations.

DISCUSSION

1. ORS AND THE POAS DO NOT DISPUTE THE CONSTITUTIONAL BASIS AND THE PRINCIPLES THAT JUSTIFY REPARATIONS TO DIUC.

The DIUC Submission clearly articulates the precedent upon which it relies for the constitutional standards applicable to the question now before the Commission. However, neither the ORS Brief nor the POA Brief address these concepts of law or their applicability to the facts at issue here. With regard to the applicable constitutional standard, DIUC has established:

- Where the rates allowed for a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service…their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment." *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va*., 262 U.S. 679, 690, 43 S. Ct. 675 (1923).

- "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service, and rates not sufficient to yield that return are confiscatory." *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31, 46 S. Ct. 363, 366 (1926) (citing *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 29 S. Ct. 192 (1909) and *Bluefield Waterworks*, 262 U. S. at 679, 43 S. Ct. at 675).

- Rates are confiscatory if they do not address the cost of property of the utility and all sums required to meet operating expenses. *Bluefield Waterworks*, 262 U.S. at 691, 43 S. Ct. at 678.

- "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 109 S. Ct. 609, 616 (1989).

- To be constitutionally appropriate, the ultimate result of a rate must be "a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 288, 88 L. Ed. 333 (1944).

- "That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.* (citing *State of Missouri ex rel. South-western Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276, 291, 43 S.Ct. 544, 547 (1923) (Brandeis, concurring).

- "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on debt and dividends on the stock …." *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 597, 244 S.E.2d 278, 281 (1978)

- "By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *Id.*

- "That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.*

See DIUC Submission at 12-17.

2. RATHER THAN ADDRESSING DIUC'S CONSTITUTIONAL CLAIMS, THE ORS AND POAS BRIEFS ATTEMPT TO MISDIRECT THE COMMISSION.

Both briefs submitted in opposition to DIUC's Submission lead off with bold statements that are presumably intended to explain away the lack of any attention to the constitutional standards at issue. Specifically, the POAs Brief asserts, "The primary flaw with DIUC's Request for Reparations ("Request") is there is no *applicable* legal authority to support it" and the ORS Brief claims, "DIUC mistakenly argues that the retroactive application of rates has not been addressed by South Carolina courts." POAs Brief at 1; ORS Brief at 2.

Those statements are simply not accurate. First, as to the POAs, the DIUC Submission amply analyzes applicable precedent and authority supporting the kind of relief requested herein and the applicability of the same in this context. Second, as to the ORS attempt to reframe DIUC's position, DIUC has *never* asserted 'that the retroactive application of rates has not been addressed by South Carolina courts.' DIUC's position, based on federal law, South Carolina law, and accepted ratemaking principles is:

> The issue currently before the Commission is DIUC's request for reparations and refunds made necessary by the length of this proceeding and the impact of the two appeals.
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> ***
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> Although South Carolina courts have not yet addressed this specific issue [of awarding reparations when the actions of the ORS, among others, has extended a rate case excessively and needlessly], other courts have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking.

DIUC Submission at 12.

The DIUC Submission further explains, "other courts have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking." DIUC Submission at 21 (citing *R.R. Comm'n of Texas v. High Plains Nat. Gas Co.*, 628 S.W.2d 753, 754 (Tex. 1981) ("[a]llowing the utility to recover the incremental expenses lost as a result of the improperly

mandated ninety percent PGA clause is not retroactive rate relief but restitution of a lost operating cost" that the utility would have been recovering but for the erroneous order reversed on appeal.); and *State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina*, 312 N.C. 59, 68, 320 S.E.2d 679, 686 (1984) (disallowing refunds to a utility would deny adequate relief to appellants who appeal from erroneous orders of the Commission)).

DIUC does not assert South Carolina courts have not addressed the concept of general retroactive ratemaking; additionally, the ORS attempt to reframe DIUC's arguments should not mislead this Commission into thinking that DIUC argues retroactive ratemaking is somehow generally (or specifically) permissible. That is not DIUC's position.

What the ORS and POAs briefs fail to acknowledge or respond to is the constitutional mandate that authorizes and requires the relief DIUC seeks. DIUC's rates for the period at issue were "not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service" and therefore their enforcement deprives [DIUC] of its property in violation of the Fourteenth Amendment." *Bluefield Waterworks*, 262 U.S. at 690, 43 S. Ct. at 675. Furthermore, the ultimate result of the rates for the period at issue was not "a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks." *Hope Nat. Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288. Accordingly, the rates were not constitutionally sufficient and DIUC is entitled to relief.

By failing to address the essential question at issue, the ORS and POA Briefs are deficient in their response to the support provided by DIUC for its requested relief. *See* DIUC Submission at 21-24 (citing *R.R. Comm'n of Texas*, 628 S.W.2d at 754; *State ex rel. Utilities Comm'n*, 312 N.C. at 68, 320 S.E.2d at 686; *Appeal of Granite State Elec. Co.*, 120 N.H. 536, 539, 421 A.2d 121, 122–23 (1980); and *Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 420 S.C. 305,

316, 803 S.E.2d 280, 286 (2017) (overturning *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986)) ("*DIUC I*").

3. REPARATIONS SOUGHT HERE ARE NOT RETROACTIVE RATEMAKING.

The DIUC Submission presents complete support for a ruling that a Commission rate order is not final until all appeals are exhausted or the time to appeal has expired. *See* DIUC Submission at 22. Further, when the Supreme Court determines upon timely appeal to reverse a Commission order, the rates permitted by that reversed order are still not "final" since they will not be "lawfully established" until changed on remand and any subsequent appeals have ended by order. If the error(s) of law in the initial order on appeal resulted in constitutionally deficient rates paid to the utility during the pendency of the appeal(s), reparations may be ordered.

ORS and the Intervenors have both agreed "that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary." Order 2021-132, Order Approving Settlement Agreement and Further Procedure, at pp. 4-6 with Settlement Agreement. Accordingly, the issued rates are not final rates and, as such, the requested modification of the issued rates are not retroactive ratemaking. *See* DIUC Submission at 21-24 and cases cited therein.

As an open proceeding, the data, evidence and information -- as well as the rates to be ordered -- are all subject to change in this docket. Those changes do not create retroactive ratemaking because they are not altering final orders of the Commission. This logic is consistent with the Supreme Court's instruction in *DIUC I*:

> Furthermore, we take this opportunity to overturn *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that ***a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence.*** Rate cases are heavily dependent upon factors which

> are subject to change during the pendency of an appeal, thus ***it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.***

420 S.C. at 316, 803 S.E.2d at 286 (double emphasis added). The Commission, currently considering this matter on remand, is to focus on ascertaining "the current economic realities" at issue for DIUC, and that reality requires the reparations requested.

There has been no final, lawful order so the Commission is still acting under its ratesetting authority in this pending, open docket.

4. THE ESSENTIAL PUBLIC POLICY CONCERN AGAINST RETROACTIVE RATEMAKING IS NOT IMPLICATED HERE.

As the ORS and POAs point out, a rate is impermissibly retroactive when it requires customers to pay for services that were used by others. *See* ORS Brief at 3 (quoting *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997). This is because of the "general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use." *Id.*; *see also* POA Brief at 14 ("The prospect that a current ratepayer could be responsible for additional charges applicable to a rate for service provided in the past underscores the express statutory policy prohibiting retroactive ratemaking applied in South Carolina.")

The reparations DIUC seeks will not impose on any customer charges for the usage of water or sewer services by any other customer. Since this proceeding began DIUC has kept records of past payments and refunds to each customer so that precise amounts due for each account can be calculated then billed. That means the actual customers that received the benefit of the 2018 refunds will be notified of the change. Only the customers who actually received water and sewer services from October 1, 2017 until March 1, 2021, at the lower confiscatory rates will be billed for the difference. Each customer's billing will be calculated based upon the services that specific

customer consumed, thereby remedying each customer's prior windfall. *See Exhibit JFG-RR3* to Testimony of John F. Guastella on Second Rehearing ("As required, DIUC has kept records of payments by each customer so that precise amounts would be charged to each customer.").

The correction requested by DIUC simply would not operate as a retroactive rate does. The requested relief is consistent with the "general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use." *See* ORS Brief at 3 (quoting *Porter*, 328 S.C. at 231, 493 S.E.2d at 97 (1997)). Accordingly, the requested relief is not barred as a retroactive rate.

5. THIS COMMISSION HAS THE AUTHORITY TO GRANT THE REQUESTED RELIEF.

The POAs Brief asserts that this Commission lacks the authority to grant the relief herein requested. *See* POAs Brief at 5 ("the Commission's power to grant reparations must be expressly set out in a particular statute, and cannot be implied from the Commission's general powers"). The Brief goes on to cite to S.C. Code 58-5-210 for the claim that "There is no express language granting that power in Section 58-5-210…." *Id.*

Contrary to the POAs position, South Carolina courts have routinely held that regulatory bodies, including this Commission, not only possess those powers that statutes explicitly conferred upon them, but ***also*** possess the powers ***implied for those bodies to fulfil their statutorily imposed duties and roles***. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005) (quoting *Captain's Quarters Motor Inn); Hamm v. Cent. States Health & Life Co. of Omaha*, 299 S.C. 500, 506, 386 S.E.2d 250, 254 (1989) ("We

find that S.C.Code Ann. § 38–3–110(1) (Supp.1987), which imposes the duty on the [Insurance] Commissioner to supervise and regulate rates, by reasonable and necessary implication, confers the authority upon the Commissioner to make refunds in this case."); 73B C.J.S. Public Utilities § 162 ("A public utilities commission thus possesses such powers and jurisdiction as are thereby conferred expressly by constitutional or statutory provisions or by necessary or fair implication."); and *Riley v. S.C. State Highway Dep't*, 238 S.C. 19, 25, 118 S.E.2d 809, 811 (1961) ("we think the power of condemnation is necessarily implied from the general authority granted under the statutes which we have reviewed.").

In *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948), the Supreme Court had occasion to discuss this Commission's implied powers when considering a challenge to the Commission's practice of transferring franchises related to electric utilities. The question posed was "whether it is within the power of the Public Service Commission to approve, after a hearing, the transfer by a motor freight carrier to another freight carrier of a portion of a certificate of convenience and necessity held by the former." *Beard-Laney, Inc.,* 213 S.C. at 386, 49 S.E.2d at 566. Examining the issue, the Court discussed this Commission's implied powers:

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the *field* which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it. To say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.

Beard-Laney, Inc. v. Darby, 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948).

Likewise, in *City of Columbia v. Bd. of Health & Env't Control*, 292 S.C. 199, 355 S.E.2d 536 (1987), the Supreme Court stressed that "[b]y necessity … a regulatory body possesses not

only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged." *City of Columbia,* 292 S.C. at 202, 355 S.E.2d at 538. The Court also specifically noted that "delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public." *Id.* (citing *In re Review of Health Care Admin. Board,* 83 N.J. 67, 415 A.2d 1147, *appeal dismissed,* 449 U.S. 944, 101 S.Ct. 342, 66 L.Ed.2d 208 (1980).

The reparations DIUC seeks are an action within the express and implied powers of this Commission and, if there is a question of authority, the health and welfare at stake with the Commission's duties justifies liberal construction so as to view implied powers broadly. *See* S.C. Code Ann. § 58-5-210 (Commission is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed…").

The POAs and ORS also argue that S.C. Code Ann. § 58-5-290 prohibits the relief sought by DIUC. *See* POAs Brief at 10 and ORS Brief at 3-4. However, in *Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n*, 272 S.C. 81, 248 S.E.2d 924 (1978), the Supreme Court examined Section 58-5-290 and concluded after broadly interpreting the Commission's authority that:

> While it is true the Commission is not a court and does not sit to enforce contractual rights, it is equally true the Commission exercises quasi-judicial powers in the fulfillment of its responsibility under Section 58-5-290 as the arbiter of the reasonableness of rates charged by public utilities.

Carolina Water Serv., Inc., 272 S.C. at 87, 248 S.E.2d at 927. So, contrary to the urgings of the ORS and POAs, the Supreme Court has instructed that in considering S.C. Code § 58-5-290, the Commission should take a broad view of its implied authority. Applying that instruction here, it is clear that the Commission has the authority to act in this instance to protect the rights of DIUC.

The POAs also make an argument that the Commission is not authorized to enter the requested order because in *S.C. Elec. and Gas Co. v. Pub. Serv. Comm'n of S.C,* 275 S.C. 487, 272 S.E.2d 793 (1980), the Supreme Court stated, "The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility."). Again, as previously addressed herein, until the appeals have concluded in this open docket, there is no final order. Additionally, there has been no "lawful rate" established, given that the Supreme Court reversed Commission Order 2018-68 and the complete rate structure has not been settled. *See Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), *reh'g denied* (Sept. 27, 2019) ("*DIUC II*") ("The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.").

Also espousing an argument that the Commission is not authorized to act in this matter, the ORS Brief relies upon *S.C. Elec. and Gas Co.* for the incomplete proposition that "'[A]s creatures of statute, regulatory bodies are possessed of only those powers which are specifically delineated.'"

Reliance by ORS and the POAs on *S.C. Elec. & Gas Co.* is misplaced. In that case the Supreme Court evaluated whether the Commission had the power to award refunds to retail electric customers and ultimately ruled against the refunds. However, that case did not deal with a utility's protected constitutional rights to earn a return on used and useful property or the constitutional requirement that utilities be permitted to earn enough to plan, attract capital, cover operating expense, and earn a profit. *S.C. Elec. & Gas Co.* simply does not contemplate the Commission's authority to award reparations to utilities for confiscatory rates. ORS even admits that *S.C. Elec.*

& Gas Co. is not on point, stating that "while the issue in [*S.C. Elec. & Gas Co.]* was a refund a utility was ordered to pay its customers, the reasoning applies with equal force here." ORS Brief at 8. ORS offers no support for this conclusory assertion, except that *S.C. Elec. & Gas Co.* really means more than what it *actually* says. There is only one sentence in *S.C. Elec. & Gas Co*. that uses the word reparations. It reads: "The Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute." *S.C. Elec. & Gas Co.,* 275 S.C. at 491, 272 S.E2d at 795. Again, the issue in *S.C. Elec. & Gas Co.* is simply not the same as the issue before the Commission in this matter. DIUC is not urging the Commission to refund retail electric consumers by way of reparations, which is the only type of reparations that the Court ruled the Commission cannot award in *S.C. Elec. & Gas Co*. The language of the Court's opinion is clear. Its holding is specific, as the above quote indicates. Nothing in the opinion states that the Court's holding applies to all types of reparations, or even any type of reparations, particularly the unique relief sough here to protect DIUC from confiscation of property and earnings.

In *Hamm*, 299 S.C. at 502, 386 S.E.2d at 251, the South Carolina Supreme Court reviewed its decision in *S.C. Elec. & Gas Co.*, when considering the very same arguments made by ORS and the POAs here. In *Hamm*, Central States relied on *S.C. Elec. & Gas Co*. to support its position stating that "[t]he Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such powers must be expressly conferred by statute." *Id.* at 504, 253. The Court rejected the application of *S.C. Elec. & Gas Co*. and ruled:

> *SCE & G* is easily distinguished from the present case. In *SCE & G,* we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in *SCE & G,* would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be *unlawful.* As such, a refund in this instance would not be considered retroactive ratemaking.

Id. Having distinguished *S.C. Elec. & Gas Co*. for the same reasons it is inapplicable here, the Supreme Court went on to conclude in *Hamm* that "that S.C. Code Ann. § 38-3-110(1) (Supp.1987), which imposes the duty on the Insurance Commissioner to supervise and regulate rates, by reasonable and necessary implication, confers the authority upon the Commissioner to make refunds in this case." *Id.* at 386, 254. Likewise, here, the previous order was reversed; there has been no "lawful rate" given that the Supreme Court reversed Commission Order 2018-68 and the complete rate structure is not settled. *See DIUC II*, 427 S.C. at 464, 832 S.E.2d at 575 ("The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.").

The precedent cited by ORS and the POAs does not support a ruling that this Commission is without authority to provide the relief requested by DIUC.

6. THE CONCEPTS OF STATUTORY LIMITATION AND RETROACTIVE RATEMAKING MUST GIVE WAY TO PROTECTION OF DIUC'S CONSTITUTIONAL RIGHTS.

The concepts of statutory limitation and retroactive ratemaking must give way to protection of the rights of a utility guaranteed by the Constitution. For example, in *New England Tel. & Tel. Co. v. Pub. Utilities Comm'n*, the Supreme Court of Rhode Island addressed the rule of retroactive ratemaking and specifically identified the caveat to that rule:

> This holding is accompanied by the caveat that a rate schedule which represents a deprivation of due process either in its inability to provide a fair return or in the grossly excessive time it took to correct good faith errors of the commission in arriving at the new rates would certainly entitle the company to some sort of extraordinary relief.

116 R.I. 356, 392, 358 A.2d 1, 22 (1976) (citing *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 809 (4th Cir. 1952)); *see also In re Island Hi-Speed Ferry, LLC*, 852 A.2d 524, 533 (R.I. 2004) (discussing and quoting *New England* (when the commission issues "a rate schedule which

represents a deprivation of due process either in its inability to provide a fair return or in the grossly excessive time it took to correct good faith errors of the commission in arriving at the new rates …" then relief to the utility is authorized and justified); *Accord Bristol County Water Co. v. Harsch,* 120 R.I. 223, 231, 386 A.2d 1103, 1108 (1978) (recognizing exception); *Narragansett Electric Co. v. Burke,* 119 R.I. 559, 569, 381 A.2d 1358, 1363 (1977) (same).[1] There can surely be no doubt among the parties that this lengthy case has covered a "grossly excessive" amount of time thereby delaying final relief to DIUC. Accordingly, the traditional applications of retroactive ratemaking and statutory limitations must give way to protection of DIUC's constitutional rights.

It should also be noted that the *New England* decision explicitly states its ruling is related to appeals necessary to address "good faith errors of the commission." *Id.* In the instant case, the circumstances are more suspect that those referenced in *New England*.

For example, when discussing the status of this proceeding during its second appeal, the South Carolina Supreme Court stated that "[t]the commission is 'vested with power . . . to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State.'" *DIUC II*, 427 S.C. at 463, 832 S.E.2d at 574 (quoting S.C. Code Ann. § 58-3-140(A) (2015)). The Court went on to find that behavior on rehearing following the first remand included "retaliatory actions by ORS" that were "deeply troubling" to the Court because they demonstrated "an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers." *Id.* (emphasis in original). "Likewise," the Court continued, "we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against

[1] This also disposes of the POAs' argument that S.C. Code § 58-5-290 prevents the relief sought. *See also* pages 10-11, *supra*, discussing S.C. Code Ann. § 58-5-290.

parties who prevail against them on appeal." *Id.*

The Supreme Court clearly found that the situation and circumstances keeping DIUC from a proper and lawful ruling were far worse than the "good faith" situation discussed in *New England*. As a judicial determination of the unreasonableness of the rates included in the Order on Rehearing, the Supreme Court's decision certainly constitutes a repudiation of the rate and the ORS behavior that supported it.

7. AMPLE INFORMATION IN THE RECORD SUPPORTS THE REQUESTED RELIEF.

The POAs Brief suggests that the Commission cannot award any relief to DIUC unless the Commission makes additional findings:

> DIUC's arguments that the Subsequently Approved Rates were "insufficient rates" (DIUC Brief, p. 14), "constitutionally insufficient" (DIUC Brief, p. 16), violated "DIUC's federal and state constitutional rights" (DIUC Brief, p. 17), or otherwise improper are bare assertions and nothing more. There has been no finding from this Commission addressing or granting any such claim. More particularly, those factual *claims* that would presumably support its Request have not been adopted as *findings* by this Commission.

POA Brief at 12.

The solution to this alleged problem is simple – the Commission need only look to the record in this proceeding for ample support. For example, the Affidavit of John F. Guastella submitted with DIUC's Submission in Support of Request for Reparations includes sworn testimony regarding the confiscatory nature and impact of rates upon DIUC:

> 10. As the President of GA, DIUC's manager, I am familiar with every aspect of the Utility, including its books, records, finances, assets, and liabilities.
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> 11. Commission Order 2015-846 purported to provide DIUC an ROE of 9.28% and Order 2018-68 purported to provide DIUC an ROE of 9.31%; however, neither Order produced the ROE indicated because the Orders' calculations did not include all actual operating costs of the Utility.
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> 12. It is not lawful for a utility regulatory commission to refuse rate relief in an amount adequate to provide a utility with an opportunity to pay actual costs

and to earn a reasonable return, or deny recovery of specific utility investments.

13. As explained in DIUC's Submission in Support of Reparations and as is demonstrated by the record of proceedings and filings to date in Docket 2014-346-WS and in South Carolina Supreme Court Appellate Cases 2016-000652 and 2018-001107, the rates permitted by Commission Orders 2015-846 and 2018-68 were constitutionally insufficient and, as such, the reparations now requested by DIUC are necessary to remedy violation of DIUC's federal and state constitutional rights.

14. I have had ample opportunity to examine impact of the Commission's rate orders in this proceeding. The rates allowed by Order 2015-846 and Order 2018-68 did not generate rates sufficient for DIUC to earn a reasonable rate of return. The rates have negatively impacted the financial integrity of DIUC and failed to generate sufficient revenue for payment of all expenses, debt service, and capital costs of the business. Further, the rates failed to allow the owner of DIUC to earn a return upon equity commensurate with returns on investments in other enterprises having corresponding risks and the rates were not sufficient to assure confidence in the financial integrity of the utility, so as to maintain its credit and to attract capital.

Exhibit B, DIUC Submission in Support of Reparations Affidavit of John F. Guastella at ¶¶ 10 to 14.

The Second Rehearing Testimony of Mr. Guastella, filed with the Commission on June 16, 2020, also presents support for any findings the Commission may wish to make. That testimony addresses a variety of topics relevant to the issue before the Commission:

Page 15: How DIUC implemented the rates allowed by Order 2015-846 and Order 2018-68.

Page 16: The rate setting mechanisms DIUC asks the Commission to apply to address the shortfalls created by Orders 2015-846 and 2018-68.

Page 18: Calculation of the impact of the delayed implementation of proper rates upon DIUC.

Page 18: Mr. Guastella's expert opinion as to whether DIUC has been permitted to implement constitutionally sufficient rates.

Exhibits: Exhibit JFG-RR1, Motion and Proposed Order
Exhibit JFG-RR2, Schedule for Second Rehearing,

Exhibit JFG-RR3, Schedule for Remediation/Reparation, and
Exhibit JFG-RR4, Revenue Shortfall.
Exhibit JFG-RR5, Return Deficiency Calculation

See Testimony of John F. Guastella on Second Rehearing with Exhibits, June 16, 2020.

There is ample information upon which the Commission could base any findings, should it be so inclined. Of course, if an evidentiary hearing is preferred, DIUC will certainly provide any additional information and/or evidence the Commission requires.

7. ORS AND INTERVENORS NOW AGREE DIUC'S ORIGINAL APPLICATION SOUGHT JUST AND REASONABLE RATES.

In its original Application, DIUC sought a 108.9% increase over the existing rates from DIUC's last application in 2010. The increase would generate additional revenue of $1,182,301, which would have increased DIUC's total adjusted revenue to $2,267,722. ORS and the Intervenors opposed that increase and convinced this Commission to accept a Settlement Agreement allowing only a 43% rate increase. *See* Order No. 2015-846. DIUC appealed the order. On appeal the Supreme Court flatly rejected the ORS-POA Settlement Order finding:

> The Order's reliance on the ORS exclusion of equipment from rate base was totally "unsupported by the substantial evidence in the record."
>
> The Order's adoption of the ORS-POA refusal to allow DIUC to collect revenue sufficient to cover its known tax obligations was "directly contrary to the evidence in the record."
>
> When the only evidence in the record showed DIUC had been unable to collect well over $100,000 in bad debt, the Order's adoption of the ORS-POA suggestion of only $30,852 for DIUC's bad debt expense was "unsupported by the evidence in the record."

DIUC I, 420 S.C. 305, 317-20, 803 S.E.2d 280, 286-88 (2017).

The Supreme Court reversed and remanded. Upon rehearing ORS and the Intervenors continued to oppose the Application's requested increase of 108.9%, and even sought further discovery over DIUC's objections thereby increasing DIUC's rate case expenses. At the eventual

rehearing ORS and the Intervenors continued to oppose DIUC's requested 108.9% increase and DIUC's proposed revenue requirement. The Commission again accepted ORS's and the Intervenor's positions causing DIUC to expend even more resources and time to appeal and ultimately obtain another reversal from the Supreme Court.

In the second appeal DIUC challenged the Order on Rehearing and its 88.5% increase in rates, explaining the Order on Rehearing subjected DIUC to a rate structure that is unconstitutionally insufficient to allow DIUC to collect rates that meet the minimum standards required by law. *See* App. Case No. 2018-001107, Appellant's Brief at 12 (citing *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107 n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks*, 262 U.S. at 690, 43 S. Ct. at 675 (explaining that where the rates charged by a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service … their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment")).

On appeal DIUC explained that "ORS and the commission applied a higher standard of scrutiny on remand in retaliation against DIUC for successfully seeking reversal of the commission's initial order." *DIUC II*, 427 S.C. at 460, 832 S.E.2d at 573. The Supreme Court was not pleased with the events of remand:

> These retaliatory actions by ORS are deeply troubling. We rightly demand more of governmental representatives—like ORS—than such an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers. Likewise, we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal.

Id. at 461, 573.

The Supreme Court again remanded the case to the Commission, this time for a third hearing. ORS propounded more discovery and another year passed. Then, with a third hearing

looming, ORS and the Intervenors finally agreed to settle the case and in doing so affirmed that the full 108.39% increase sought all along by DIUC is "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy." Settlement Agreement at pp. 5-6; *see also* Order 2021-132. Notably, DIUC's original Application sought revenue $2,267,722. The Settlement revenue number is $2,267,714 – only $8 difference from the original Application after over six years of litigation required by the ORS and Intervenors' objections to this amount.

DIUC's Request for Reparations is based upon these specific revenue amounts, and the DIUC Submission explained why the circumstances of this case require the relief sought:

> So, finally, ORS and the Intervenors agree to the Application's requested revenue but not until after they have cost DIUC six years of legal and consulting fees and lost return without the adequate rates. However, ORS and the Intervenors also take the position that DIUC should be denied these rates in reparations. ORS and the Intervenors want this Commission to rule that because ORS and the Intervenors were able to extend this case by six years of costly litigation, they have somehow earned the right to delay implementation of the rates they have now agreed are "just, fair, and reasonable, [and] it is in accord with applicable law and regulatory policy." Such a result is contrary to both federal and state law.

DIUC Submission at 12.

In response to the DIUC Submission, both ORS and the POAs have attempted to focus the Commission on various adjustments and components to distract from the fact that both ORS and the POAs have now consented to the 108.9% increase they fought against for the last six years.

ORS, for example, asserts, "While the dollar figure settled upon is nearly equal to the dollar figure that DIUC originally sought, the composition of those rates is substantively different." ORS Brief at 8. The difference that ORS refers to is the fact that a major component of the costs ORS agreed to include in the rates in order to reach the 108.9% increase are Rate Case Expenses that were incurred by DIUC in fighting for incremental 43% increase then the 88.5% increase via two appeals and rehearing. These are the same Rate Case Expenses that ORS partially accepted at the

first hearing and then on remand rejected by subjecting DIUC's evidence to "a retaliatory, higher standard of scrutiny on remand." *DIUC II,* 427 S.C. at 464, 832 S.E.2d at 575 (noting "As counsel for ORS conceded, 'The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny.' This arbitrary, higher standard of scrutiny affected substantial rights of DIUC. The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing."). However, ORS admits it did not allow those expenses until after the second remand when it demanded an even higher level of scrutiny and the Commission required DIUC to comply. *See* ORS Brief at 9 (citing Commission Order No. 2020-700). ORS asks the Commission to focus on these components of the 108.9%; however, that is unwise as it only highlights the fact that ORS is agreeing to DIUC's original request ***and*** ORS has again engaged in the same thing the Supreme Court called "retaliatory" and "deeply troubling" and "an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers." *DIUC II*, 427 S.C. at 463, 832 S.E.2d at 574.

Likewise, the POAs Brief attempts to explain away its recent agreement to DIUC's original 108.9% increase request by making a circular argument that "Revenues are Not Rates". POAs Brief at 13. The Brief continues:

> DIUC is correct that its Application sought total operating revenues of $2,267,721 (Application Schedule A-4, Pro Forma Proposed Rates, Total Revenues), and the Order on Second Rehearing approved total operating revenues of $2,267,714 (Order on Second Rehearing, Exhibit One, "Operating Statement-Water and Wastewater Combined").5 However, the expenses and assets for which DIUC initially sought approval in its Application are not the same as those approved by the Commission in the Order on Second Rehearing.

Id. The problem with this logic is that the truth refutes it. Ultimately, the POAs Brief admits:

> As DIUC knows, the real reason for the similarity between the two numbers is because the "original 108.9% revenue increase that was noticed to the customers in accordance with the 2014 historical test year data ...." (Order on Second Rehearing at p. 2) provided a "cap" on the amount of revenues the Current Rates could produce.

Id. at FN 5.

And that is exactly the point DIUC is making. ORS and the POAs drove up the Rate Case Expenses over the past 6 years such that rates without all the previous components exceed the 108.9% noticed amount or "cap". The recent Settlement Agreement does nothing but allow DIUC to collect costs it incurred during the rate case up to the notice cap, which is even more reason that the requested reparations are appropriate. DIUC is not being made whole by the new rates and, in fact, even with the increase it is suffering unconstitutional confiscation without the requested restitution.

It cannot be denied that after six years of litigation the ORS and POAs have now *actually* agreed that the original 108.9% increase in revenue sought by DIUC from the initial filing of its Application is an appropriate rate increase. S*ee* Order 2021-132, Order Approving Settlement Agreement and Further Procedure, with Settlement Agreement. The numbers cannot be denied.

CONCLUSION

As explained in DIUC's Submission in Support of Reparations with Exhibits A and B, the unusual events of this lengthy rate proceeding have resulted in a denial of DIUC's right to a reasonable opportunity to recover its costs of operation and its right to earn a fair and reasonable rate of return on their capital investments. ORS and the POAs do not dispute the constitutional basis and the principles that justify reparations to DIUC, but they do present opposition to the requested relief. That opposition, however, fails to justify denial of the constitutionally mandated relief sought by DIUC. Accordingly, this Commission should grant DIUC's Request for

Reparations and enter an order permitting DIUC to proceed with calculating the amounts to be billed to the continuing customers of the utility that received the benefit of the previous refund and the benefit of DIUC's services at the lower, unconstitutional rates for the period herein defined.

Respectfully submitted,

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July 2, 2021
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that on July 2, 2021, I caused to be served upon the counsel of record named below a copy of DIUC's Reply Brief in Support of Request for Reparations via electronic mail, as indicated. A copy of the Response was also filed via the Commission's DMS.

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